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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON
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No. _____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
9/11/2019
DEANA WILLIAMSON, CLERK

JONATHAN WILLIAM DAY, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal Cause No. 01-18-00289-CR
Tarrant County Criminal Court at Law No. 1

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Jonathan William Day.

* The trial judges were the Honorable Rainey Webb (voir dire) and Presiding Judge Daryl Coffey, Tarrant County Court at Law Number 1 (guilt and punishment).

* Counsel for Appellant at trial were Robert K. Gill, 201 Main Street, Suite 801, Fort Worth, Texas 76102 and Tim Brown, 1901 Central Drive, Suite 706, Bedford, Texas 76021.

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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

JONATHAN WILLIAM DAY, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal Cause No. 01-18-00289-CR
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* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

To evade arrest or detention, the officer's attempt to seize the defendant must be "lawful." Discovering a warrant for the defendant's arrest should suffice—regardless of any earlier illegality. Either there is no tainting subsequent police conduct, or the discovery of the warrant attenuates it, just as in the Fourth Amendment context.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request argument.

STATEMENT OF THE CASE

A jury convicted Appellant of evading arrest.[1] He was sentenced to 220 days in county jail.[2] On appeal, he challenged sufficiency of the evidence—specifically, the lawfully-attempting-to-detain element.[3] The court of appeals held that while Appellant's initial detention was justified, his continued detention was not, and thus there was no evidence to support his conviction.[4]

STATEMENT OF PROCEDURAL HISTORY

The court of appeals reversed and rendered a judgment of acquittal.[5] The State filed a motion for rehearing and argued that subsequent discovery of the warrant

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[1] TEX. PENAL CODE § 38.04.

[2] CR 84; 4 RR 42.

[3] He also raised two additional points of error that the court of appeals did not reach because it rendered a judgment of acquittal. *Day v. State*, No. 01-18-00289-CR, 2019 WL 2621740, at *4 (Tex. App.—Houston [1st Dist.] June 27, 2019) (not designated for publication).

[4] *Id*. at *3-4.

[5] *Id*. at *4.

rendered the earlier, prolonged detention lawful. The court of appeals denied the motion on August 8, 2019, without altering its opinion.[6] This petition is timely filed on or before September 9, 2019.

GROUNDS FOR REVIEW

1. Can an officer's attempt to detain or arrest a suspect, which is otherwise lawful, be tainted by an earlier illegality and thereby negate evading's lawful-arrest-or-detention element, just as evidence is tainted under fruit-of-the-poisonous-tree?

2. Will discovery of an arrest warrant necessarily render an attempted seizure on the warrant "lawful" (despite an earlier illegality) for purposes of evading arrest?

3. If an earlier illegality can taint the officer's attempted detention, does discovery of a warrant provide an independent source for the detention or attenuate the taint?

ARGUMENT

The statute at issue

Evading arrest requires "intentionally flee[ing] from a person [the defendant] knows is a peace officer … attempting lawfully to arrest or detain him."[7] This Court

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[6] Letter dated August 8, 2019, *Jonathan William Day v. State*, No. 01-18-00289-CR, available on the First Court of Appeals website.

[7] TEX. PENAL CODE § 38.04(a). Authority from this Court indicates the *defendant* need not

has not construed what "lawfully" means in this context.[8] While "lawfully" is not statutorily defined, the Penal Code definition of "law" includes the federal and state constitutions and statutes and "a written opinion of a court of record."[9]

Background

A police officer with an arrest warrant for someone else was waiting outside a house when several people, including Appellant, arrived.[10] The officer determined

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know that the attempted arrest is lawful. *Jackson v. State*, 718 S.W.2d 724, 726 (Tex. Crim. App. 1986); *Hazkell v. State*, 616 S.W.2d 204, 205 (Tex. Crim. App. [Panel Op.] 1981). But *Hazkell* construed the pre-1993 version of the evading statute which, instead of an element, made an unlawful arrest an exception for the State to negate. It provided:

> (a) A person commits an offense if he intentionally flees from a person he knows is a peace officer attempting to arrest him.
>
> (b) It is an exception to the application of this section that the attempted arrest is unlawful.

Act of 1973, 63rd Leg., R.S., ch. 399, § 1, Tex. Gen. & Special Laws (S.B. 34) (eff. Jan 1, 1974). Inserting the requirement of lawfulness into the phrase "knows is a peace officer . . . attempting to arrest him" may raise new questions about the mental state requirement. Here, it does not matter. If the warrant made his seizure lawful, Appellant undoubtedly knew about it, having volunteered that information.

[8] An interpretation of this element will likely also affect the offense of escape, which similarly requires that a defendant must be "lawfully detained" before an escape from detention is criminalized. TEX. PENAL CODE § 38.06(a)(1).

[9] TEX. PENAL CODE § 1.07(a)(30).

[10] 3 RR 67-71.

Appellant wasn't the subject of the warrant, but he detained Appellant and the others to see if any had warrants of their own.[11] Appellant told the officer he did,[12] and dispatch confirmed that he had a warrant.[13] The officer let Appellant make a phone call but told him, "You can't leave, you're under arrest."[14] Appellant fled anyhow.[15]

He was charged and convicted of evading arrest.[16] On appeal, he challenged the element requiring that the detention he fled from be "lawful." The First Court of Appeals held that while Appellant's initial detention may have been justified by the belief that he was the man the police were looking for, once they determined that he was not, "there was no basis to suspect that he was involved in criminal activity and his detention should have ended."[17] Given this illegality, the court of appeals held

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[11] 3 RR 73, 78, 88, 93-94, 99.

[12] 3 RR 79, 88. The officer assumed the admission concerned a fine-only offense, and told him, "I'm not worried about a Fort Worth traffic warrant." 3 RR 79-80. The warrant dispatch discovered was for a "county level" offense. 3 RR 28 (suppression hearing).

[13] The warrant dispatch discovered was not from Fort Worth. 3 RR 81-82, 90.

[14] 3 RR 84.

[15] 3 RR 82-84, 91-92.

[16] CR 6 (information), 83 (jury verdict).

[17] *Day*, 2019 WL 2621740, at *3.

no rational factfinder could decide Appellant's detention was lawful.[18]

The State Prosecuting Attorney argued in a motion for rehearing that discovery of Appellant's warrant rendered his detention lawful—either because fruit-of-the-poisonous-tree had no application to the legality of subsequent police conduct or because discovery of the warrant purged any taint.[19] The court of appeals denied rehearing without comment.[20]

The detention Appellant fled from was lawful; it is not evidentiary fruit susceptible of taint from an earlier illegality.

Discovery of the arrest warrant made Appellant's subsequent detention lawful in its most straightforward sense. An arrest warrant is a magistrate's order "commanding" a peace officer "to take the body of the person accused of an offense to be dealt with according to law."[21] It authorized—perhaps "compelled"—Appellant's arrest.[22] How could his detention under such authority be "unlawful" if

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[18] *Id.*

[19] State Prosecuting Attorney's Motion for Rehearing, *Jonathan William Day v. State*, No. 01-18-00289-CR, available on the First Court of Appeals's website.

[20] Letter dated August 8, 2019, *Jonathan William Day v. State*, No. 01-18-00289-CR, available on the First Court of Appeals's website.

[21] TEX. CODE CRIM. PROC. art. 15.01.

[22] *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016).

his arrest was then being commanded by a magistrate? As the Seventh Circuit explained:

> It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of "Olly, Olly, Oxen Free." Because the arrest is lawful, a search incident to the arrest is also lawful.[23]

The Supreme Court in *Utah v. Strieff* came to the same conclusion about how to characterize the legality of police conduct (as opposed to the admissibility of evidence) following discovery of a warrant: "once Officer Fackrell was authorized [by the warrant] to arrest Strieff, it was undisputedly lawful to search Strieff as an incident of his arrest...."[24] While both courts went on to consider attenuation of the taint to determine if *evidence* was obtained through the exploitation of an earlier illegality and thus should be suppressed, they recognized that *seizing* the subject of the arrest warrant was perfectly lawful despite the earlier illegality.

Exclusionary rule concepts do not apply to the "lawfulness" element of evading.

It is only because of the fruit-of-the-poisonous-tree doctrine that anyone would contend that Appellant's detention at the time he fled was unlawful. But that

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[23] *United States v. Green*, 111 F.3d 515, 521 (7th Cir. 1997).

[24] 136 S. Ct. at 2063.

doctrine, like attenuation of the taint, is a product of the exclusionary rule,[25] which is not at issue here. The exclusionary rule was created to enforce the Fourth Amendment. First, it barred the admission of unlawfully obtained evidence.[26] Later, it barred any *use* of that evidence[27]—either obtained directly from the violation or more distantly derived from it.[28] Although attorneys and courts sometimes say that an arrest is unlawful because it stems from a suspicionless stop,[29] that is a misnomer. The exclusionary rule's bar on evidence derived from an initial illegality does not purport to determine the inherent lawfulness of any subsequent police action—just the admissibility of evidence with a causal connection to the illegality. And apart from the exclusionary rule's doctrines, nothing in the text of the Fourth Amendment, Article I, Section 9 of the Texas Constitution, or Chapter 14 of the Code of Criminal

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[25] *Id.* at 2061.

[26] *Weeks v. United States*, 232 U.S. 383 (1914).

[27] *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Nardone v. United States*, 308 U.S. 338 (1939).

[28] *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963).

[29] *See, e.g.*, *Rodriguez v. State*, 578 S.W.2d 419, 420 (Tex. Crim. App. 1979) (finding evidence of evading arrest insufficient because, as there was no reasonable suspicion for the initial detention, the defendant's "subsequent arrest would be tainted and therefore unlawful").

Procedure governing arrests makes it illegal to detain or arrest a person if there has been an earlier violation or if the police would not have been where they were but for an earlier illegality. It is only in the exclusionary rule. It is incongruent to extend an exclusionary rule concept of taint to the question of whether an officer is acting lawfully when a defendant flees from him. The exclusionary rule is only applicable "where its deterrence benefits outweigh its 'substantial social costs.'"[30] The court of appeals was wrong to apply it reflexively.

This Court held that evading's "lawfulness" element should not be determined as a suppression issue pretrial because pretrial hearings are not appropriate for determining sufficiency issues.[31] Not only that—the inquiries are different. If the officer in Appellant's case had actually arrested him pursuant to the warrant, Appellant could not have successfully challenged his arrest as fruit-of-the-poisonous-tree. Such an arrest, despite the earlier Fourth Amendment violation, would have been undoubtedly legal. It should not make any difference that Appellant's earlier detention had become unlawful. What matters for a conviction

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[30] *Hudson v. Michigan*, 547 U.S. 586, 591 (Tex. Crim. App. 2006).

[31] *Woods v. State*, 153 S.W.3d 413, 415 (Tex. Crim. App. 2005).

for evading is the lawfulness of the arrest or detention Appellant fled from. If he had fled before notifying the officer he had an outstanding warrant or before the officer discovered it for himself, the court of appeals would have been correct.[32] But any detention predicated on a known warrant is not unlawful and fruit-of-the-poisonous-tree cannot make it so.

Following this strictly proper understanding of "lawful" arrest or detention has a practical benefit. Untangled from the doctrines of fruit-of-the-poisonous-tree and attenuation-of-the-taint, the law on evading will be easier for jurors to apply.[33]

Alternatively, if fruit-of-the-poisonous-tree applies, so does independent source and attenuation-of-the-taint.

Even if the exclusionary rule doctrines are not, strictly speaking, a good fit for determining whether a particular seizure is "lawful" as an element of evading, the legislature may have intended them to be incorporated. When this Court considered what was meant by the term "arrest" for the related offense of escape, it applied the

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[32] The same would be true without any intervening circumstance supporting probable cause to arrest.

[33] *Cf. Robinson v. State*, 377 S.W.3d 712, 719 (Tex. Crim. App. 2012) (authorizing jury instructions under TEX. CODE CRIM. PROC. art. 38.23(a) to determine contested *fact* issues, not whether there is probable cause or reasonable suspicion).

term of art from the Fourth Amendment.[34] It also incorporated the Fourth Amendment's legitimate-expectation-of-privacy standard into a definition relevant to the wiretapping statute.[35]

Also, this Court may decide, as a policy matter, that it is too difficult to tease out application of these doctrines because they are so ingrained for attorneys. Fourth Amendment questions are almost always litigated in the context of a suppression hearing where the exclusionary rule's application is the whole point.[36]

One thing is certain: if the fruit-of-the-poisonous-tree doctrine applies, then so do the related doctrines of independent source and attenuation-of-the-taint. In the earliest cases prohibiting the admission of evidence derived from an illegality, the Supreme Court recognized independent source[37] and attenuation:

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[34] *Medford v. State*, 13 S.W.3d 769, 773 (Tex. Crim. App. 2000).

[35] *Long v. State*, 535 S.W.3d 511, 520 (Tex. Crim. App. 2017), *cert. denied*, 138 S. Ct. 1006 (2018).

[36] *Id.* at 519 ("Ordinarily, the determination of whether a legitimate expectation of privacy exists is litigated in the context of a motion to suppress rather than as an element of an offense.").

[37] *Silverthorne Lumber Co.*, 251 U.S. at 392 ("this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others…").

> Sophisticated argument may prove a causal connection between information obtained through illicit [search] and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation—fair to the intendment of [the statute at issue], but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges.[38]

Discovery of the warrant was an independent source for the detention Appellant fled from or it purged any taint.

Under the independent source doctrine, "evidence derived from or obtained from a lawful source, separate and apart from any illegal conduct by law enforcement, is not subject to exclusion."[39] Here, the warrant pre-existed the officer's interaction with Appellant and provided a basis for his arrest that was, as in *Strieff*, "wholly independent" of the earlier unlawful detention.[40] It thus was justified under the independent source doctrine.

Alternatively, discovery of the warrant attenuated any taint. In the exclusionary rule context, the three factors set out in *Brown v. Illinois*[41] determine

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[38] *Nardone*, 308 U.S. at 341.

[39] *Wehrenberg v. State*, 416 S.W.3d 458, 465 (Tex. Crim. App. 2013). *See also Segura v. United States*, 468 U.S. 796 (1984).

[40] *Strieff*, 136 S. Ct. at 2063.

[41] 422 U.S. 590, 603-04 (1975).

whether an intervening circumstance, like the discovery of an arrest warrant, purges any taint on the evidence from the initially illegality.[42] The court considers (1) the "temporal proximity" between the unconstitutional conduct and the discovery of evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct.[43] Modified to fit the circumstances of subsequent police conduct (a search or seizure) instead of the discovery of evidence, these factors favor finding that any taint from the unlawfully continued detention is purged by the revelation of the warrant.

Here, the prolonged detention was close in time to the discovery of the warrant—both having taken place during the initial moments of the officer's interaction with the people arriving at the house.[44] "But when an outstanding arrest warrant *is* discovered . . . the importance of the temporal proximity factor decreases."[45] Here, that factor strongly favors attenuation because the warrant

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[42] *Strieff*, 136 S. Ct. at 2061-62.

[43] *Id.*

[44] Defense counsel identified the start of the encounter at 8:44 a.m. and discovery of the warrant from dispatch at 8:50. 3 RR 39, 42. Regardless, only a "substantial time" lapse would favor attenuating taint. *Strieff*, 136 S. Ct. at 2062.

[45] *State v. Mazuca*, 375 S.W.3d 294, 306 (Tex. Crim. App. 2012). Both *Mazuca* and *Strieff* hold that the third factor is of greatest importance in the evidence suppression context. *Id.*;

predated and was independent of the officer's detention. And like the officers in *Strieff* and *Mazuca*, the officer's misconduct here was not purposeful or flagrant enough to warrant exclusion of evidence or a finding that the detention pursuant to the warrant was unlawful. As the court of appeals acknowledged, the officer was right to have initially detained Appellant; his mistake was in not permitting him to leave once he had been identified. This intrusion, while it may have been mistaken, was brief and appeared to have been made in good faith. [46]

Because this earlier illegality does not taint the officer's attempt to detain Appellant once he discovered the warrant or because discovery of the warrant purged any such taint, this Court should intervene and hold that the detention Appellant ran from was lawful.

Strieff, 136 S. Ct. at 2062.

[46] It can be inferred that the single officer likely felt overwhelmed in dealing with six people who all arrived on the scene in a short period of time. He testified that he should have called for backup as soon as he approached, but did not think about it because he was so "concerned with everybody, all the stuff going on." 3 RR 90.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition, reverse the judgment of the court of appeals finding the evidence insufficient to support a finding that the attempted detention was lawful, and remand to the court of appeals for consideration of Appellant's remaining points of error.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that, according to Microsoft Word's word-count tool, this document contains 2,519 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 9th day of September 2019, the State Petition for Discretionary Review was served *via* email or certified electronic service provider on the parties below.

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APPENDIX

Court of Appeals's Opinion

2019 WL 2621740
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Do not publish. TEX. R. APP. P. 47.2(b).
Court of Appeals of Texas, Houston (1st Dist.).

Jonathan William DAY, Appellant
v.
The STATE of Texas, Appellee

NO. 01-18-00289-CR
|
Opinion issued June 27, 2019

On Appeal from County Criminal Court at Law No. 1, Tarrant County, Texas, Trial Court Case No. 1498320

Attorneys and Law Firms

Robert K. Gill, for Jonathan William Day.

Steven Baker, Joseph Wilson Spence, for State of Texas.

Panel consists of Justices Lloyd, Kelly, and Hightower.

MEMORANDUM OPINION

Russell Lloyd, Justice

***1** A jury found appellant, Jonathan William Day, guilty of the misdemeanor offense of evading arrest or detention, and the trial court assessed his punishment at 220 days in county jail. [1] In three points of error, appellant contends that (1) the evidence was insufficient to support the jury's verdict; (2) the pretrial identification process involving a punishment witness was so suggestive that it tainted the in-court identification of appellant as the suspect in an unadjudicated car chase incident; and (3) the trial court erred in overruling appellant's objection to the testimony of an expert witness who was not on the State's witness list. We reverse.

1 Originally appealed to the Second Court of Appeals in Fort Worth, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE § 73.001.

Background

On May 15, 2015, C.W. Heizer, Marshal for Richland Hills, arrived at a residence to serve a warrant on a man named Danny Branton. As Heizer sat in his car three houses away finishing paperwork, he saw two bicyclists pull into the driveway of the residence. Concerned that one of the individuals might be Branton, Heizer got out of his car to approach them before they could enter the residence.

As he exited the car, Heizer saw a white SUV followed by a tan truck pass him and pull into the driveway. Appellant, the driver of the white SUV, began talking with one of the bicyclists. Heizer approached the men and asked them where Branton was but got no response. When the driver of the tan truck, Mr. Acorn, started his vehicle, Heizer approached the truck and asked everyone for identification. Appellant handed Heizer an ID. Heizer then noticed a woman in the back seat of Acorn's truck. Acorn's front seat passenger got out and walked into the house.

Heizer gathered the individuals' identifying information and began calling in their names and dates of birth to check for warrants. Appellant told Heizer that he needed to go to work and wanted to leave. Heizer replied, "I'm trying to figure everything out. You got to—I just—you got to wait." Appellant then told Heizer that "[h]e had warrants out of Fort Worth," to which Heizer responded, "I'm not worried about a Fort Worth traffic warrant."

Heizer subsequently informed appellant that appellant had a warrant for his arrest out of Haltom City. Heizer allowed appellant to make a phone call but told him that he could not leave. Appellant took off running but was caught two blocks away and arrested.

At the conclusion of trial, the jury found appellant guilty of evading arrest or detention, and the trial court assessed his punishment at 220 days in county jail. This appeal followed.

Sufficiency of the Evidence

In his first point of error, appellant contends that the evidence is insufficient to support his conviction for evading arrest or detention because the State failed to prove that Heizer lawfully detained him.

A. Standard of Review

When reviewing the sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict to determine whether any rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011) (holding that *Jackson* standard is only standard to use when determining sufficiency of evidence). The jurors are the exclusive judges of the facts and the weight to be given to the testimony. *Bartlett v. State*, 270 S.W.3d 147, 150 (Tex. Crim. App. 2008). We may not re-evaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

B. Applicable Law

***2** A person commits the offense of evading arrest or detention if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him. TEX. PENAL CODE § 38.04(a). The lawfulness of the attempted detention is an element of the offense that must be proven by the State. *Guillory v. State*, 99 S.W.3d 735, 741 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

A police officer may lawfully conduct a temporary detention if there is reasonable suspicion to believe that the detained person is violating the law. *Neal v. State*, 256 S.W.3d 264, 280 (Tex. Crim. App. 2008). An officer has reasonable suspicion if the officer "has specific, articulable facts that, combined with rational inferences from those facts, would lead him to reasonably conclude that the person detained is, has been, or soon will be engaged in criminal activity." *State v. Kerwick*, 393 S.W.3d 270, 273 (Tex. Crim. App. 2013). "These facts must amount to more than a mere hunch or suspicion." *Davis v. State*, 947 S.W.2d 240, 244 (Tex. Crim. App. 1997). "The articulable facts used by the officer must create some reasonable suspicion that some activity out of the ordinary is occurring or has occurred, some suggestion to connect the detainee with the unusual activity, and some indication the unusual activity is related to crime." *Id.*

The standard for determining whether reasonable suspicion exists is an objective one. *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001). There only needs to be an objective basis for the detention; the subjective intent of the officer conducting the detention is irrelevant. *Id.* In making a reasonable suspicion determination, we consider the totality of the circumstances. *Ford v. State*, 158 S.W.3d 488, 492–93 (Tex. Crim. App. 2005). We review de novo the legal question of whether the totality of the circumstances is sufficient to support an officer's reasonable suspicion. *Madden v. State*, 242 S.W.3d 504, 517 (Tex. Crim. App. 2007).

C. Analysis

Appellant contends that Heizer unlawfully detained him because Heizer had no articulable facts which could have led him to reasonably conclude that appellant had violated the law. He argues that once he produced identification to Heizer showing that he was not Branton, Heizer's continued detention of him was unlawful. Appellant further asserts that Heizer's subsequent discovery of his warrant and his attempt to flee do not change the unlawfulness of the initial detention.

The State contends that a rational jury could have concluded that Heizer lawfully detained appellant. In support of its contention, the State argues that "because Appellant told Marshall Heizer that he was driving without a license and could only produce another type of ID when Marshall Heizer requested identification, Heizer had the reasonable suspicion necessary to detain Appellant for driving without a license." The State cites Texas Transportation Code section 521.025, which provides, in relevant part, that "[a] peace officer may stop and detain a person operating a motor vehicle to determine if the person has a driver's license as required by this section." TEX. TRANSP. CODE § 521.025(b).

However, on direct examination, Heizer testified:

> Q: All right. So [appellant] gave you his ID that identified who he was, and what did you do at that point?
>
> ***3** A: I was still dealing with the driver who was wanting to just – he claimed to back up in the street to park his truck. I told him, "You can't drive. You don't have a driver's license on you, so I need you to write down your name, date of birth," had him turn off his vehicle.

It is clear from this testimony that Heizer was referring to Acorn, the driver of the tan truck, whom Heizer testified had tried to leave and who told Heizer that he did not have an ID, and not appellant.

Appellant also contends that Heizer had no reason to detain him for driving without a license because Heizer never demanded to see a driver's license. Heizer testified:

Q: So if you asked everybody there if they were Danny Branton, if they knew who Danny Branton was and nobody said anything, what did you do next?

A: I told everybody that I needed to see their identifications.

Q: And generally what do people give you when you ask for identification?

A: Driver's license, ID card, whatever they have, passport maybe.

Q: And what did everybody say?

A: They – well, the guy in the truck tried to leave and said he didn't have an ID. The gentleman in the right front passenger seat got out, grabbed his wallet, acted like he was going to show me an ID, and then Mr. Day and Mr. Cole handed me their IDs.

Q: That ID that you got from Mr. Day, was that a driver's license?

A: No.

Q: But it was some other kind of ID?

A: Yes.

The State argues that "[o]nce Heizer saw Appellant driving and he did not produce a driver's license, Heizer had the reasonable suspicion necessary—articulable facts that combined with rational inferences—that Appellant was driving without a license." Heizer testified that (1) appellant was driving, (2) Heizer asked the individuals for identification, and (3) appellant produced a photo ID that was not a driver's license. Had Heizer asked appellant for his driver's license and appellant not produced his driver's license, Heizer would have had reasonable suspicion that appellant was driving without a license. *See* TEX. TRANSP. CODE § 521.025 (mandating that individuals driving in Texas have in their possession current driver's licenses and display them when asked to by police officer and stating that failure to comply is criminal offense). Here, however, the evidence shows only that Heizer asked to see appellant's identification and that appellant complied with his request. Furthermore, when Heizer was asked what people generally give him when he asks for identification, he replied, "Driver's license, ID card, whatever they have, passport maybe." This testimony further undermines the assertion that Heizer had articulable facts that led him to reasonably conclude that appellant was violating the law. *Kerwick*, 393 S.W.3d at 273.

The State also contends that Heizer's detention of appellant was lawful to determine whether appellant (1) was Branton and (2) had a warrant for his arrest. The State is correct that Heizer's detention of appellant to determine whether he was Branton was lawful. However, it is the continued detention *after* Heizer determined that appellant was not Branton about which appellant complains. Heizer testified that he knew appellant was not Branton once he saw appellant's identification. The State contends that Heizer's detention of appellant was lawful to determine whether appellant had a warrant for his arrest but a detention may not be prolonged solely in hopes of finding evidence of some other crime. *See Kothe v. State*, 152 S.W.3d 54, 64 (Tex. Crim. App. 2004) (concluding proposition that warrant check cannot be used solely as means to extend detention once reasonable suspicion forming basis for stop has been dispelled is consistent with rationale behind Supreme Court's development of Fourth Amendment law); *Davis*, 947 S.W.2d at 245 (holding purpose of stop for suspicion of DWI effectuated and detention should have ended when officer determined driver was merely tired). Once Heizer determined that appellant was not Branton, there was no basis to suspect that he was involved in criminal activity and his detention should have ended.

***4** Based on the totality of the circumstances, we conclude that there is insufficient evidence of specific, articulable facts showing reasonable suspicion for Heizer's detention of appellant. *See Davis*, 947 S.W.2d at 241. Therefore, there is no evidence from which a rational jury could determine that appellant's detention was lawful. *Adames*, 353 S.W.3d at 859. Accordingly, we sustain appellant's first point of error. [2]

2 Because appellant's first point of error affords him the greatest relief and is dispositive of the appeal, we need not address his remaining points of error concerning whether (1) the pretrial identification process involving a punishment witness tainted his in-court identification of appellant and (2) the trial court erred in overruling his objection to the testimony of an expert witness who was not on the State's witness list. *See* TEX. R. APP. P. 43.3, 47.1.

Conclusion

Because the evidence is insufficient to support appellant's conviction for evading arrest or detention, we reverse the trial court's judgment and render a judgment of acquittal.

All Citations

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